



TC04461

Appeal number: TC/2014/02953

CONSTRUCTION INDUSTRY SCHEME - penalties - late filing of returns - Appellant asserted that he was not obliged to file returns because subcontracts were on a 'one-off basis' - whether reasonable excuse - no - appeal not allowed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

PASCHAL OKORO

Appellant

- and -

**THE COMMISSIONERS FOR HER MAJESTY'S Respondents
REVENUE & CUSTOMS**

**TRIBUNAL: JUDGE MICHAEL CONNELL
MEMBER RUTH WATTS DAVIES
MHCIMA FCIPD**

Sitting in public at Fox Court 14 Grays Inn Road London on 7 January 2015

Mr Gabriel Akintunde for the Appellant

Mr Ian Birtles, Officer of HM Revenue and Customs, for the Respondents

DECISION

The Appeal

1. This is an appeal by Paschal Okoro (“the Appellant”) against penalties of £10,500 reduced to £1,914.92, imposed on the Appellant by HMRC under s 98A Taxes Management Act 1970, for his failure to make monthly returns by the due date under the Construction Industry Scheme (“CIS”).
2. The issue before us is whether the Appellant has a reasonable excuse for making the late returns.

The CIS penalty regime

3. The CIS is a tax compliance scheme for businesses operating in the construction industry. This is an industry that often involves “cash in hand” transactions. Historically, this resulted in a significant loss of tax and National Insurance contributions because many sub-contractors engaged in the industry “disappeared” without settling their tax liabilities, with a consequential loss of revenue to the Exchequer.
4. The legal basis of the CIS, as it has been in force from 6 April 2007, is ss 57 -77 of the Finance Act 2004 (“FA 2004”) and the Income Tax (Construction Industry Scheme) Regulations 2005 (SI 2005/2045) (the “2005 Regulations”). The CIS requires certain payments by contractors to sub-contractors to be made subject to deduction of tax. The sub-contractors are entitled to claim credit for tax withheld under CIS against their tax liability for the tax year in question.
5. Contractors are required to make a return no later than 14 days after the end of every tax month (a “monthly return”) (s 70 FA 2004 and reg 4 of the 2005 Regulations). For these purposes, a tax month means the period beginning with the 6th day of a calendar month and ending on the 5th day of the following month. A monthly return must therefore be received by HMRC no later than the 19th day of the month. Nil returns are also required (s 70 FA 2004 and reg 4(10) of the 2005 Regulations).
6. If a monthly return is received after the filing date, it will be treated as late and the contractor will be liable to a penalty under s 98A of the Taxes Management Act 1970 (“TMA”) (introduced by the Finance Act 1989 and amended by FA 2004), which provides:

“(1)regulations under section 70(1)(a) or 71 of the Finance Act 2004 (sub-contractors) may provide that this section shall apply in relation to any specified provision of the regulations.

(2) Where this section applies in relation to a provision of regulations, any person who fails to make a return in accordance with the provision shall be liable -

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(a) to a penalty or penalties of the relevant monthly amount for each month (or part of a month) during which the failure continues, but excluding any month after the twelfth or for which a penalty under this paragraph has already been imposed,

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and

(b) if the failure continues beyond twelve months, without prejudice to any penalty under paragraph (a) above, to a penalty not exceeding -

(ii) in the case of a provision of regulations under section 70(1Xa) or 71 of the Finance Act 2004, £3,000.

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(3) For the purposes of subsection (2)(a) above, the relevant monthly amount in the case of a failure to make a return -

(a) where the number of persons in respect of whom particulars should be included in the return is fifty or less, is £100”

15 7. Late filing penalties are therefore chargeable for each month during which a return is outstanding after the filing date for a maximum of 12 months and a further penalty if the return has still not been filed after 12 months. There are two types of penalty:

1. The monthly penalty of £100 for each month or part month that a return is late during the first 12 months when the employer has no more than 50 sub-contractors; and

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2. A final late return (commonly referred to as the “month 13 penalty”) if the failure to submit a return continues after 12 months. The month 13 penalty may not exceed £3,000.

The total exposure to penalty for any one return is thus a maximum of £4,200.

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8. HMRC’s policy in calculating the appropriate month 13 penalty is to charge an increasing tariff based on the number of instances a return is over 12 months late in a rolling 12 month period. Thus the amounts levied in respect of the month 13 penalty for each failure in a 12 month period depend on the number of previous final penalties issued in that period. The tariff amounts are as follows:

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1st failure - £300, 2nd failure - £600, 3rd failure - £900, 4th failure - £1,200, 5th failure - £1,500, 6th and later failures - £3,000.

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9. Under s 100 of TMA, an authorised officer of HMRC may make a determination imposing a penalty under the provisions of the Taxes Acts; s 100(3) requires notice of such a determination to be served on the person liable. So far as material, s 100 provides as follows:

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“(1) Subject to subsection (2) below and except where proceedings for a penalty have been instituted under section 100D below ... an officer of the Board authorised by the Board for the purposes of this section may make a determination imposing a penalty under any provision of the Taxes Acts and setting it at such amount as, in his opinion, is correct or appropriate.

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(3) Notice of a determination of a penalty under this section shall be served on the person liable to the penalty and shall state the date on which it is issued and the time within which an appeal against the determination may be made.

(4) After the notice of a determination under this section has been served the determination shall not be altered except in accordance with this section or on appeal....”

5 10. Section 118(2) of TMA states that where a person had a reasonable excuse for not doing anything which was required to be done, he shall be deemed not to have failed to do it if he did it without reasonable delay after the excuse ceased. The subsection provides:

10 “(2) For the purposes of this Act, a person shall be deemed not to have failed to do anything required to be done within a limited time if he did it within such further time, if any, as the Board or the tribunal or officer concerned may have allowed; and where a person had a reasonable excuse for not doing anything required to be done he shall be deemed not to have failed to do it unless the excuse ceased and, after the excuse ceased, he shall be deemed not to have failed to do it if he did it without unreasonable delay after the excuse had ceased.”

11. Under s 102 of TMA, HMRC has a specific power to mitigate penalties. The section provides:

20 “The Board may in their discretion mitigate any penalty, or stay or compound any proceedings for a penalty, and may also, after judgment, further mitigate or entirely remit the penalty.”

25 12. Schedule 55 to the Finance Act 2009 introduced a new penalty regime for the late filing of returns. The regime came into force for CIS monthly returns with effect from 6 October 2011 and applies to returns due to be filed on or after 19 November 2011. In November 2010, in the light of the fact that the new CIS penalty regime would shortly come into force, HMRC introduced a revised policy for considering mitigation of penalties under s 102 of TMA for late contractors’ monthly returns. This policy was announced on HMRC’s website. HMRC compared the penalties charged under s 30 98A of TMA with the amounts that would be charged under Schedule 55. If the penalties under the new regime were less, HMRC offered to mitigate the s 98A penalties to the lower amount, using their discretion under s 102 of TMA.

Background facts

35 13. The Appellant was late submitting his monthly CIS returns for the period from 6 May 2011 to 5 October 2011.

40 14. The Appellant had been registered on HMRC’s system as a sub-contractor within the CIS scheme since 6 April 2009. Because he bought in labour, he became a contractor within the scheme and although he had declared CIS costs on his SA returns he had not complied with his obligation to register as a contractor and submit monthly CIS 300 returns as required. Further, because the sub-contractor had not registered himself as such under the CIS scheme until 23 November 2011, the Appellant had an obligation to deduct tax at 30%. That however is a separate matter, as this appeal relates to penalties imposed for non-submission of returns not the amount of tax deductible.

45 15. On 11 February 2013, HMRC notified the Appellant of his liabilities to penalties.

16. On 13 May 2013, HMRC offered to reduce the penalties under s 102 TMA. The total penalties charged under s 98A TMA 1970 had been calculated as £10,500. However, HMRC said they would cap the penalties charged under s 98A TMA 1970 to £1,914.92 to correspond with penalties that would have been payable under Schedule 55 Finance Act 2009.

17. The Appellant responded via his accountant Mr Akintunde on 23 July 2013, that:

- “1. The Appellant is not a “Contractor” for the purpose of being registered and liable to relevant Regulations under the Construction Industry Scheme.
2. The Appellant agrees that he engaged a “self-employed labourer”, but that this was on the occasion of a “one off situation to cope with sudden increase in trade”.
3. The labourer concerned duly declared money paid to him on his own tax return and, therefore, “there is no loss of revenue to HMRC by the action of the Appellant.”

18. On 6 August 2013 HMRC replied that they had considered the Appellant’s assertions, but rejected these on the basis that there was a legal requirement under FA 2004 and the 2005 Regulations, as explained in Booklet CIS 340, to deduct tax at source from sub-contractors.

19. After a further exchange of correspondence, the Appellant lodged his Notice of Appeal with the Tribunal on 20 May 2014.

The Appellant’s case

20. At the hearing, Mr Akintunde largely reiterated the grounds of appeal as stated in the Appellant’s letter of 23 July 2013, and also said that the penalties were disputed under the Taxpayer’s Charter because the Appellant had not been treated fairly. He said HMRC had not lost any revenue because the sub-contractor had paid his own taxes. The Appellant had only bought in labour on a one-off basis. He estimated the costs of filing CIS returns at £100 per month, which would have been out of all proportion to the amounts involved.

HMRC’s case

21. Every company that registers for the CIS scheme is sent a ‘Guide for Contractors and Sub-Contractors’. The guide clearly sets out how the scheme operates, when returns are required and the consequences of late returns (Chapter 4 of the Booklet). The guide states that the returns must be filed every month - 14 days from the end of the tax month. The guide clearly sets out that penalties will be charged for late filing of returns.

22. HMRC submits that the Appellant’s reasons for not submitting returns do not amount to a reasonable excuse. The CIS exists in order that contractors may make deductions from payments to sub-contractors, on account of their final tax liability. This is a legal obligation as covered in the FA 2004, and the 2005 Regulations. Penalties are automatically issued for every month that a particular return is late.

23. HMRC has relieved the contractor of this liability under Regulation 9(4) of the 2005 Regulations as the sub-contractor, on this occasion, did actually declare his

income and pay the resulting tax due himself. Unfortunately however, the contractor failed to make the required monthly Returns to HMRC on form CIS300. The penalty calculations arise because of that.

5 24. HMRC is not treating the contractor unfairly. The contractor has failed in his obligations, and the penalty therefore arises. The penalties now due have been correctly calculated by HMRC under the legislation involved. HMRC have attempted to settle the matter by reducing the penalty to £1,914.92. However, the Appellant has made it clear that he does not wish to pay this mitigated sum, and disputes that any penalty is due at all.

10 **Conclusion**

25. From 6 April 2007, every contractor who makes payments to sub-contractors in respect of construction operations must send a monthly return with details of these payments to HMRC. This process is vital to the success of the Construction Industry Scheme.

15 26. Reasonable excuse is not defined in the legislation. The term must be given its normal everyday meaning. It normally means that there has been an unexpected or unusual event, either unforeseeable or beyond the person's control, which prevents him from complying with an obligation when he otherwise would have done.

20 27. It is necessary to consider the actions of the taxpayer from the perspective of a prudent taxpayer exercising reasonable foresight and due diligence, having proper regard for their responsibilities under the tax acts. A prudent taxpayer, armed with the CIS guidance manual, would understand at the very least that there were return dates and penalties for failure to submit. If the Appellant had any doubts at all, it was his responsibility to contact the helpline.

25 28. The requirement to be registered as a contractor within the Construction Industry Scheme is not affected by the fact that an engagement of a sub-contractor may be for just a "one-off short term contract". The length of engagement is irrelevant. A contractor must follow the requirements of relevant legislation regardless of the term of engagement.

30 29. The Appellant says that the sub-contractor was taken on "with the understanding that he would be responsible for his own tax and NIC to the Inland Revenue". Again this is not relevant, as contractors operating within the Construction Industry Scheme do not have a freedom of choice under the relevant legislation. Ignorance of the law is not a reasonable excuse. It was the responsibility of the Appellant to acquaint himself with the CIS regulations. He could have contacted HMRC if he required any
35 guidance.

40 30. HMRC can only act in accordance with legislation. The penalties have been applied in accordance with the relevant legislation. The Appellant has not been treated unfairly. The appeal does not contain anything which demonstrates that an unexpected or unusual event, either unforeseeable or beyond the Appellant's control, prevented him from complying with his obligations under the CIS.

31. Under s 98A TMA, the Appellant was originally charged penalties totalling £10,500. HMRC have offered to reduce the amount of penalties charged to £1,914.92

under s 102 TMA so that the penalties are commensurate with those that would be imposed under Schedule 55 Finance Act 2009.

48. For the above reasons we find that the mitigated penalties of £1,914.92 were correctly charged and the appeal is dismissed

5 49. This document contains full findings of fact and reasons for the decision. Any
party dissatisfied with this decision has a right to apply for permission to appeal
against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax
Chamber) Rules 2009. The application must be received by this Tribunal not later
10 than 56 days after this decision is sent to that party. The parties are referred to
“Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)”
which accompanies and forms part of this decision notice.

15 **MICHAEL CONNELL**

TRIBUNAL JUDGE

RELEASE DATE: 25 April 2015

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